

Introduced by Senator MurrayFebruary 19, 2004

An act to amend Sections 17529.1, 17529.5, and 17529.8 of the Business and Professions Code, relating to business.

LEGISLATIVE COUNSEL'S DIGEST

SB 1457, as introduced, Murray. Commercial e-mail advertisements.

Existing state law prohibits a person or entity from collecting e-mail addresses or registering multiple e-mail addresses for purposes of the initiation or advertisement in an unsolicited commercial e-mail advertisement sent from California or to a California e-mail address. Existing state law also prohibits a person or entity from advertising in a commercial e-mail advertisement that is sent either from California or to a California e-mail address if the e-mail contains or is accompanied by certain falsified, misrepresented, obscured, or misleading information. Existing state law authorizes the recipient of an unsolicited commercial e-mail advertisement transmitted in violation of these prohibitions, the e-mail service provider, or the Attorney General to bring an action to recover actual damages, and authorizes a court to award reasonable attorney's fees and costs to a prevailing plaintiff. A violation of the provisions governing advertising is a misdemeanor.

This bill would define commercial e-mail advertisements to include both solicited and unsolicited advertisements. The bill would prohibit a person or entity from initiating or advertising in a commercial e-mail advertisement either sent from California or sent to a California e-mail address if the e-mail or an attachment to the e-mail contains or is accompanied by any false, misrepresented, obscured, forged, or



misleading information. The bill would also prohibit a commercial e-mail advertisement sent from California or to a California e-mail address, or an attachment thereto, from containing a statement that includes deceptive information regarding the authorization by the recipient to send commercial e-mail advertisements or regarding opting out of receiving future commercial e-mail advertisements. This bill would authorize the recipient of an e-mail advertisement transmitted in violation of any of the above provisions, the e-mail service provider, or the Attorney General to bring an action to recover actual damages and liquidated damages of \$1,000 per e-mail advertisement transmitted in violation of the provisions, up to \$1,000,000 per incident, subject to reduction by the court, and would authorize the award of reasonable attorney's fees and costs to a prevailing plaintiff.

Because a violation of the bill would be a crime, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 17529.1 of the Business and Professions
- 2 Code is amended to read:
- 3 17529.1. For the purpose of this article, the following
- 4 definitions apply:
- 5 (a) "Advertiser" means a person or entity that advertises
- 6 through the use of commercial e-mail advertisements.
- 7 (b) "California electronic mail address" or "California e-mail
- 8 address" means any of the following:
- 9 (1) An e-mail address furnished by an electronic mail service
- 10 provider that sends bills for furnishing and maintaining that e-mail
- 11 address to a mailing address in this state.
- 12 (2) An e-mail address ordinarily accessed from a computer
- 13 located in this state.
- 14 (3) An e-mail address furnished to a resident of this state.



(c) “Commercial e-mail advertisement” means any electronic mail message, *whether solicited or unsolicited, that is* initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

(d) “Direct consent” means that the recipient has expressly consented to receive e-mail advertisements from the advertiser, either in response to a clear and conspicuous request for the consent or at the recipient’s own initiative.

(e) “Domain name” means any alphanumeric designation that is registered with or assigned by any domain name registrar as part of an electronic address on the Internet.

(f) “Electronic mail” or “e-mail” means an electronic message that is sent to an e-mail address and transmitted between two or more telecommunications devices, computers, or electronic devices capable of receiving electronic messages, whether or not the message is converted to hard copy format after receipt or is viewed upon transmission or stored for later retrieval. “Electronic mail” or “e-mail” includes electronic messages that are transmitted through a local, regional, or global computer network.

(g) “Electronic mail address” or “e-mail address” means a destination, commonly expressed as a string of characters, to which electronic mail can be sent or delivered. An “electronic mail address” or “e-mail address” consists of a user name or mailbox and a reference to an Internet domain.

(h) “Electronic mail service provider” means any person, including an Internet service provider, that is an intermediary in sending or receiving electronic mail or that provides to end users of the electronic mail service the ability to send or receive electronic mail.

(i) “Initiate” means to transmit or cause to be transmitted a commercial e-mail advertisement or assist in the transmission of a commercial e-mail advertisement by providing electronic mail addresses where the advertisement may be sent, but does not include the routine transmission of the advertisement through the network or system of a telecommunications utility or an electronic mail service provider through its network or system.

(j) “Incident” means a single transmission or delivery to a single recipient or to multiple recipients of ~~unsolicited~~ a

1 commercial e-mail advertisement containing substantially similar
2 content.

3 (k) “Internet” has the meaning set forth in paragraph (6) of
4 subdivision (e) of Section 17538.

5 (l) “Preexisting or current business relationship,” as used in
6 connection with the sending of a commercial e-mail
7 advertisement, means that the recipient has made an inquiry and
8 has provided his or her e-mail address, or has made an application,
9 purchase, or transaction, with or without consideration, regarding
10 products or services offered by the advertiser.

11 Commercial e-mail advertisements sent pursuant to the
12 exemption provided for a preexisting or current business
13 relationship shall provide the recipient of the commercial e-mail
14 advertisement with the ability to “opt-out” from receiving further
15 commercial e-mail advertisements by calling a toll-free telephone
16 number or by sending an “unsubscribe” e-mail to the advertiser
17 offering the products or services in the commercial e-mail
18 advertisement. This opt-out provision does not apply to recipients
19 who are receiving free e-mail service with regard to commercial
20 e-mail advertisements sent by the provider of the e-mail service.

21 (m) “Recipient” means the addressee of ~~an unsolicited a~~
22 commercial e-mail advertisement. If an addressee of ~~an~~
23 ~~unsolicited a~~ commercial e-mail advertisement has one or more
24 e-mail addresses to which ~~an unsolicited a~~ commercial e-mail
25 advertisement is sent, the addressee shall be deemed to be a
26 separate recipient for each e-mail address to which the e-mail
27 advertisement is sent.

28 (n) “Routine transmission” means the transmission, routing,
29 relaying, handling, or storing of an electronic mail message
30 through an automatic technical process. “Routine transmission”
31 shall not include the sending, or the knowing participation in the
32 sending, of ~~unsolicited~~ commercial e-mail advertisements.

33 (o) “Unsolicited commercial e-mail advertisement” means a
34 commercial e-mail advertisement sent to a recipient who meets
35 both of the following criteria:

36 (1) The recipient has not provided direct consent to receive
37 advertisements from the advertiser.

38 (2) The recipient does not have a preexisting or current
39 business relationship, as defined in subdivision (l), with the



1 advertiser promoting the lease, sale, rental, gift offer, or other
2 disposition of any property, goods, services, or extension of credit.

3 SEC. 2. Section 17529.5 of the Business and Professions
4 Code is amended to read:

5 17529.5. It is unlawful for any person or entity to *initiate or*
6 *advertise using in* a commercial e-mail advertisement either sent
7 from California or sent to a California electronic mail address
8 under any of the following circumstances:

9 (a) The ~~commercial~~ e-mail advertisement contains or is
10 accompanied by a third party's domain name without the
11 permission of the third party.

12 (b) The ~~commercial~~ e-mail advertisement contains or is
13 accompanied by falsified, misrepresented, obscured, or forged
14 header information. This ~~paragraph~~ *subdivision* does not apply to
15 truthful information used by a ~~third party~~ *third-party* who has been
16 lawfully authorized by the advertiser to use that information.

17 (c) The ~~commercial~~ e-mail advertisement has a subject line that
18 a person knows would be likely to mislead a recipient, acting
19 reasonably under the circumstances, about a material fact
20 regarding the contents or subject matter of the message.

21 (d) *The e-mail advertisement, or an attachment to the*
22 *advertisement, contains or is accompanied by false,*
23 *misrepresented, obscured, forged, or misleading information.*

24 (e) *The e-mail advertisement, or an attachment to the*
25 *advertisement, is accompanied by a statement that includes*
26 *deceptive information regarding either:*

27 (1) *Authorization by the recipient to send commercial e-mail*
28 *advertisements to that recipient.*

29 (2) *Opting out of receiving future commercial e-mail*
30 *advertisements.*

31 SEC. 3. Section 17529.8 of the Business and Professions
32 Code is amended to read:

33 17529.8. (a) (1) In addition to any other remedies provided
34 by this article or by any other provisions of law, a recipient of an
35 ~~unsolicited —commercial~~ e-mail advertisement transmitted in
36 violation of this article, an electronic mail service provider, or the
37 Attorney General may bring an action against an entity that
38 violates any provision of this article to recover either or both of the
39 following:

40 (A) Actual damages.

1 (B) Liquidated damages of one thousand dollars (\$1,000) for
2 each ~~unsolicited commercial~~ e-mail advertisement transmitted in
3 violation of ~~Section 17529.2~~ *this article*, up to one million dollars
4 (\$1,000,000) per incident.

5 (2) The recipient, an electronic mail service provider, or the
6 Attorney General, if the prevailing plaintiff, may also recover
7 reasonable attorney's fees and costs.

8 (3) However, there shall not be a cause of action against an
9 electronic mail service provider that is only involved in the routine
10 transmission of the ~~unsolicited commercial~~ e-mail advertisement
11 over its computer network.

12 (b) If the court finds that the defendant established and
13 implemented, with due care, practices and procedures reasonably
14 designed to effectively prevent ~~unsolicited commercial~~ e-mail
15 advertisements that are in violation of this article, the court shall
16 reduce the liquidated damages recoverable under subdivision (a)
17 to a maximum of one hundred dollars (\$100) for each ~~unsolicited~~
18 ~~commercial~~ e-mail advertisement, or a maximum of one hundred
19 thousand dollars (\$100,000) per incident.

20 SEC. 4. No reimbursement is required by this act pursuant to
21 Section 6 of Article XIII B of the California Constitution because
22 the only costs that may be incurred by a local agency or school
23 district will be incurred because this act creates a new crime or
24 infraction, eliminates a crime or infraction, or changes the penalty
25 for a crime or infraction, within the meaning of Section 17556 of
26 the Government Code, or changes the definition of a crime within
27 the meaning of Section 6 of Article XIII B of the California
28 Constitution.

